No. 86-1573

In the Supreme Court of the United States

OCTOBER TERM, 1986

CONNER AIR LINES, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that the court of appeals erred in denying its motion for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d).

1. Petitioner is an air cargo carrier operating under a certificate of authority issued by the Federal Aviation Administration (FAA). On March 18, 1986, petitioner refused an FAA inspector's request to see records concerning the maintenance of one of its aircraft (Pet. App. 11a-12a, 13a). Petitioner subsequently agreed to make the records available for inspection on March 24, 1986, but only if it was permitted to record the inspection on audio- and videotape. FAA inspectors initially agreed to this procedure, but ultimately informed petitioner that the presence of the taping equipment interfered with the inspection. When petitioner refused to remove the taping equipment, the inspection ended. *Id.* at 12a-13a. Two days later, after petitioner again refused to permit the inspection to proceed in the absence of taping equipment, the FAA suspended petitioner's certificate of authority, treating petitioner's conduct as a refusal to allow inspection (*id.* at 13a). See 49 U.S.C. 1429(a).

Petitioner immediately challenged the FAA's order before the National Transportation Safety Board (NTSB or Board). Pending completion of those administrative proceedings, petitioner moved for an emergency stay of the FAA's order in the court of appeals. On April 4, 1986, a stay was granted by a divided panel of the Eleventh Circuit (Pet. App. 1a). Three days later, an NTSB administrative law judge [ALJ] rejected petitioner's challenge to the FAA's order, noting, among other things, that the members of an FAA inspection team must have an opportunity for contemporaneous, confidential discussions about their findings (see *id.* at 15a-16a n.14).

The ALJ's decision was in turn reversed by the NTSB (Pet. App. 5a-18a). Noting that the facts of the case were essentially undisputed (*id.* at 10a), the Board held that petitioner's "unobtrusive[] recording" would not have interfered with the FAA inspection (*ibid.*). The Board recognized that "[t]his issue presents a purely legal question of [statutory] interpretation and application which has not been addressed by the Board" (*id.* at 15a). And while the Board found "support in the record" for the ALJ's finding that petitioner had refused to allow FAA inspection of its records on March 18, 1986 (*id.* at 13a), the Board concluded that petitioner had adequately complied with FAA regulations by providing access to its documents on March 24, 1986, the day scheduled for the inspection (*ibid.*). "[U]nder the particular facts of this case," the NTSB stated, petitioner's actions on March 24 "did not prevent or obstruct the [FAA's] inspection of its records" (*id.* at 17a). The NTSB added that, "to the extent that this proceeding reflects an overreaction on both sides of the inspection issue, we do not condone the conduct of either party. The [FAA] has an important function to perform in insuring aviation safety and the regulated industry should, and can be made to, cooperate in reasonable efforts by the

[FAA] to discharge [its] functions" (*ibid.*). The government did not appeal from the Board's decision.

Petitioner then filed an application with the court of appeals for an award of fees under EAJA for work performed before that court in connection with the stay motion.[1] That application was denied by unpublished order (Pet. App. 3a). Petitioner's subsequent motion for reconsideration also was denied by order (*id.* at 4a).

2. Petitioner's fact-bound challenge to the denial of its fee request is without merit and does not warrant this Court's consideration. Petitioner appears to acknowledge (Pet. 13-14) that fees may not be awarded under EAJA when the government's administrative and litigation position was reasonable, even though that position did not prevail in court. See *United States* v. *Yoffe,* 775 F.2d 447, 449 (1st Cir. 1985) (citing cases). And the FAA's order here, although stayed by the court of appeals and ultimately rejected by the NTSB, plainly was reasonable. As the NTSB explained, the issue here—whether a carrier's insistence on taping a document inspection interferes with that inspection within the meaning of FAA regulations[2] —was one of first impression. The FAA interpretation of its regulations in this novel setting was upheld by an administrative law judge. The NTSB, while finding that petitioner's conduct was not proscribed by the regulations, noted petitioner's recalcitrance and emphasized the importance of the FAA mission of ensuring aviation safety. And Judge Johnson dissented from the court of appeals'

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[1] Petitioner also sought an award of fees from the NTSB for work performed before the agency; that application remains pending.

[2] Federal Aviation Regulation, 14 C.F.R. 121.81(a) (reprinted at Pet. App. 8a n.3) obligates certificate holders to allow the FAA, "at any time or place, to make any inspections or tests"; Federal Aviation Regulation, 14 C.F.R. 121.380(c) (reprinted at Pet. App. 8a-9a n.3) obligates certificate holders to "make all maintenance records * * * available for inspection" by the FAA.

decision even to grant a stay pending completion of the administrative process. In these circumstances, it is evident that informed minds could differ on whether the FAA acted properly in issuing its order; petitioner's fact-bound contention to the contrary (Pet. 10-15) presents no significant legal question.[3]

Petitioner's further argument (Pet. 15-18) that the court of appeals somehow abused its discretion in summarily disposing of the fee request by order is equally without merit. The EAJA contains no requirement that courts produce written opinions when they deny fee requests. Nor was there any need here for detailed factual findings, as petitioner seems to suggest (Pet. 16-17); as the NTSB explained, the facts in this case were not in dispute. The panel of the court of appeals that denied petitioner's fee request—the same panel that had *granted* its stay motion by a divided vote—had before it petitioner's application and the FAA's response; there is no reason to doubt that the court considered those materials in concluding that petitioner was not entitled to fees.

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[3] We note that there is no need to hold this case pending disposition of *Pierce* v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987), which presents the question whether EAJA fees may be awarded despite the existence of certain objective indicia that the government's position was reasonable. In this case, there is no dispute about the propriety of the standard applied by the court of appeals in judging petitioner's fee request; petitioner acknowledges that "[f]or purposes of determining whether the agency's position was substantially justified, the test is one of reasonableness" (Pet. 13). Here, moreover, the objective indicia—a dissent by one member of the court of appeals panel, and the FAA's victory before the administrative law judge in parallel administrative proceedings—plainly support the reasonableness of the government's position. And while the court of appeals' decision to grant a stay may represent a judgment that petitioner's position had some merit, that is hardly identical to a judgment that the government's position lacked *any* merit, a conclusion that petitioner would have to establish in order to prevail.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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